Dual Compensation

OGC Has Reviewed

1 March 1945

MEMORANDUM

TO: Files

FROM: [redacted] 25X1A

SUBJECT: Proposed Appointment of [redacted] 25X1A

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25X1A 1. Reference is made to the memorandum [redacted] dated 9 February 1945, concerning the possible application of the Dual Compensation Statutes in connection with the proposed appointment of 25X1A [redacted]. Said memorandum was referred to this office by [redacted] under a memorandum of 15 February 1945.

2. It is our understanding that [redacted] now holds 25X1A a part-time appointment as a P-6 in the Department of Labor with a salary on the basis of $5600 per annum. The proposed part-time appointment with OSS is classified as a P-7 at a salary rate of $6500 per annum. This information on [redacted] 25X1A appointment at the Department of Labor and proposed appointment with OSS was furnished the undersigned in a telephone conversation with Mrs. E. F. Stonesifer of Civilian Personnel Branch on 25X1A 22 February 1945. The question raised is the legality of such an appointment for [redacted] by this Agency.

3. The principal provisions of the Dual Compensation Statutes are set out in Title 5 of U. S. C., as follows:

> Sec. 58. "Double salaries. Unless otherwise specifically authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary when the combined amount of said salaries exceeds the sum of $2000 per annum." (May 10, 1916, c.117, Sec. 6, 39 Stat. 120; Aug. 29, 1916, c.417, 39 Stat. 582.) (National officers and enlisted men of the armed services are specifically exempted in Sec. 59; certain employees of the Library of Congress are excepted by Sec. 60; teachers and certain employees of the District of Columbia are excepted by Sec. 61)

> Sec. 62. "Holding other lucrative office. No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially authorized thereto by law; but this shall not apply to retired officers of the Army or Navy whenever they may be elected to public office or whenever the President shall appoint them to office by and with the advice and consent of the Senate. Retired enlisted men of the Army, Navy, Marine Corps, or Coast Guard retired for any cause, and retired officers of the Army, Navy, Marine Corps, or Coast Guard who have been retired for injuries received in battle or for injuries or incapacity incurred in line of duty shall not, within the meaning of this section, be construed to hold or to have held an office during such retirement." (July 31, 1894, c.174, Sec. 2, 28 Stat. 205; May 31, 1924, c.214, 43 Stat. 245.)
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> Sec. 70. "Extra Allowances. No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation." (R.S. Sec. 1765).

4. The rule as to employment under different Government departments of the same person in two part-time positions is stated in 11 Comp. Gen. 200, 19 November, 1931, as follows: The employment on different days of the same person in two part-time positions under different Government departments with an aggregate compensation in the two positions not in excess of the rate of $2000 per annum, is not in contravention of 5 U.S.C. 56.

5. In 12 Comp. Gen. 76, it was held, first, that for purposes of applying the principles previously set forth in the interpretation of the Dual Compensation Statutes, administrative furloughs without pay were to be considered the same as leaves of absence without pay. It was then held that in view of the terms of sections 62 and 70 of Title 5, U. S. C., a civilian employee of the Government holding a position the salary attached to which amounts to $2500 per annum or

more may not be employed in any other position under the Government with compensation attaching during the period of administrative furlough without pay. Further, it was held that in view of the terms of 5 U. S. C. 58, a civilian employee whose compensation is at a rate less than $2500 per annum may not be employed in a position under another department or office of the Government during the period of administrative furlough without pay, if the combined rate of compensation under the two positions is in excess of $2000 per annum.

6. Under the facts presented in the subject case, the aggregate salaries are at a rate in excess of $2000 per annum and two offices will be held, each of which has attached to it a salary or annual compensation in excess of $2500. Therefore, it must be concluded that in the absence of authority granted in other laws, the proposed appointment of [redacted] as a part-time employee of this Agency in a classified position with a salary at the rate of $6500 per annum, while holding a part-time appointment in the Department of Labor with a salary at the rate of $5600 per annum, is prohibited under Sections 58 and 62 of Title 5, U. S. C.

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7. In Paragraph 3 of [redacted] memorandum, there is suggested the appointment of [redacted] as an expert or consultant on a fee or per diem basis for the time actually employed. In 15 Comp. Gen. 751, 2 March 1936, it was held that 5 U. S. C. 58 does not apply to part-time or intermittent employees performing services for different Government agencies on different days if payment is on a per diem or fee basis for time actually employed. It was further stated in that opinion that if either or both of the employments are on a per-annum basis, the Dual Compensation Statute (5 U.S.C. 58) is applicable. However, in 16 Comp. Gen. 909, it was stated that 15 Comp. Gen. 751 "is not to be regarded as holding that the said Act of 1916 (5 U.S.C. 58) precludes a person employed in a part-time position on an annual basis from receiving compensation fixed by contract or agreement on a fee basis under a separate and distinct employment." This decision then held that the payment of an indefinite and undetermined sum per annum made up of charges for separate services dependent entirely upon contingencies beyond the control of the Government and the employee, ordinarily described as fees, is not salary within 5 U.S.C. 58. It was further held that a physician acting as a consultant on a fee basis is not appointment to "an office to which compensation is attached" within the meaning of 5 U.S.C. 62.

8. The decisions consistently hold that compensation computed on a time basis is "salary" as used in 5 U.S.C. 58 whether the measure of time is a year, month, day, or hour. See 18 Comp. Gen. 768, 6 April 1939. It was held in this decision that in fixing the per annum rate of a bailiff, paid $5 a day when working, the maximum number of days in the year on which it was possible to work (365 in this case) should be multiplied by the daily rate. The rate per annum thus reached and not the actual amount received is to be considered with the salary of $600 per annum received by this person as a librarian

for the purposes of 5 U.S.C. 58. In 19 Comp. Gen. 936, 4 March 1940, it was held that "salary" as used in 5 U.S.C. 58 includes per diem compensation either for full-time service or for intermittent service, but does not include compensation paid on a fee basis having no relation to the time served. Regarding 5 U.S.C. 62, it was held in 23 Comp. Gen. 275 that employment as a consultant on a WAE basis, whether compensation is fixed on a fee basis or a per diem basis is not appointment to an "office to which compensation is attached." This case also reiterated the principle that 5 U.S.C. 70 does not prohibit the holding of two offices under the Government, the salary of each of which is fixed by law, where the two services are not incompatible with each other. United States v. Saunders, 120 U.S. 126.

9. Therefore, it may be concluded that the following situation will not constitute a violation of the Dual Compensation Statutes, 5 U.S.C. 58, 62, 70:

> Where a person is employed by one Government department in a part-time position on an annual basis and then is appointed by another Government department as a consultant on a fee basis, with such fees having no relation to the time served, but made up of charges for separate services which are indefinite and undetermined and dependent entirely upon contingencies beyond the control of the Government and the employee, and even though the aggregate salary or annual compensation of both positions is in excess of $2000 or the salary or annual compensation in each of the positions is in excess of $2500.

10. The question of the use of .002 funds in the subject case should be considered. .002 funds may be expended, according to the authorization granted by Congress to OSS in the National War Agency Appropriation Act, 1945 "without regard to the provisions of law and regulations relating to the expenditure of Government funds or the employment of persons in the Government services."

11. There is an unpublished decision of the Comptroller General, B-9113, 30 April 1940, which deals with the language of Section 5(b) of the Fair Labor Standards Act of 1938 (52 Stat. 1060) providing that, "An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States." It was held that this section prevented application of the Dual Compensation Statutes. It was concluded that Congress had no intention that the language used in Section 5(b) above should be understood or construed in a narrow and restricted sense and as not including the Dual Compensation Act involved, (5 U.S.C. 58). Other statutes, less broad in their terms, were discussed, such as Section 501(c) of the Act of 28 June 1938, 49 Stat. 1984, providing for appointments without regard to Civil Service laws. Also discussed was the Act of 22 January 1936, 49 Stat. 1098, and Section 4(a) of the Act of 1 September 1937, 50 Stat. 869. Where Congress has used broad and inclusive language

instead of employing restricted language, there would seem to be no intention that the language used should be understood or construed in a narrow and limited sense.

12. The opinion B-9113, supra, is cited in 19 Comp. Gen. 926 (1940) involving Section 1 of the National Housing Act of 1934, providing that "the Administrator may.....appoint such other officers and employees as he may find necessary, and may.....fix their compensation, without regard to the provisions of other laws applicable to the employment or compensation of officers or employees of the United States." In view of this provision, it was held that payments, otherwise in violation of the Dual Compensation Statutes, were "not so clearly illegal," as to prevent the approval thereof.

13. Therefore, in view of the opinions in Paragraphs 11 and 12, and the language in the Appropriation Act for this Agency, the conclusion seems justified that such language is sufficiently broad to permit the employment of persons without regard to the Dual Compensation Statutes and compensate them from .002 funds. If, as a matter of policy, such an expenditure of .002 funds is deemed by the appropriate authorities as necessary in the proper fulfillment of this Agency's program, there is no legal objection to such a use thereof.

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